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Kiplagat Statements - Chairman's Assumption of Office

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All Commissioners and Staff

- NOTICE BOARD

RE: CHAIRMAN'S RESUMPTION OF OFFICE

Greetings from the Chairman of the Commission.

As you may all be aware, the Chairman voluntarily stepped aside (by keeping off the Commission's affairs) pending the determination of certain legal issues that had arisen regarding his appointment. In particular, the Chairman stepped aside to facilitate the easy and expeditious determination of –

- (a) an inquiry by a Tribunal that had been appointed by the Chief Justice of the Republic of Kenya to inquire into the Chairman's conduct, and whether the Chairman ought to be removed from office; and
- (b) legal proceedings (*High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 470 of 2009*) filed by a group of NGOs and human rights activists who claimed that the Chairman was neither fit to hold office nor validly appointed.

The Gazette Notice that appointed the Tribunal purported to allow it to inquire into the Chairman's "past conduct" rather than his "conduct in office." Since the Gazette Notice was inconsistent with a plain reading of section 17 of the TJRC Act, the Chairman was impelled to challenge it in the courts, through *High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 95 of 2011*. In granting the Chairman's application for leave to challenge the mandate of the Tribunal, the High Court ruled that the issue raised by the Chairman, namely whether a tribunal could be formed to inquire into "past" conduct, was valid.

Having been satisfied that the issue raised by the Chairman was valid and legitimate, the High Court suspended the operations of the Tribunal pending the determination of the dispute. The case came up for hearing several times. The court record indicates that the Tribunal's lawyers either sought an adjournment or took a position necessitating an adjournment almost every time the case came for hearing. Eventually, without the case going for hearing, on 14th October 2011, the Tribunal's lawyers informed the court that the term of the Tribunal had expired. The Tribunal's lawyers requested the court to excuse them from any further court attendances, saying they no longer had any client to represent in the case. Faced with a case challenging the mandate of a non-existent Tribunal, the Court (on 4th November 2011) directed that the Attorney General, as the custodian of the public interest, be served with court papers so that he could express any concerns or issues that might arise with regard to the Chairman's resumption of office. On 1st December 2011, the Attorney General informed the Court that he had no concerns or interest in the case. This left the Court and the

Chairman with a case without a defendant, and in which the government had no interest. The Tribunals term having expired, and there being nobody to proceed against, the Chairman was impelled to withdraw the case. The Commission was represented in the proceedings by a very eminent firm of lawyers, and expressed no objection to the withdrawal of the case.

The court case filed by human rights activist, on the other hand, went to full hearing and determination. The case revolved around the very same issues that had led to the formation of the Tribunal, namely (i) the Wagalla Massacre; (ii) the Ouko murder; and (iii) irregular land allocations. A three-judge bench of the High Court meticulously reviewed the evidence, issues and arguments raised by the parties and upheld the Chairman's appointment through a judgment issued on 28th November 2011. The Commission was also represented in this case, by a very eminent firm of lawyers. Notably, throughout the case, the Commission consistently took the positions that—

- (a) the Chairman had been validly appointed;
- (b) the Chairman was a proper and fit person to hold office;
- (c) there was no merit in the issues raised about the Chairman's appointment. Put differently, the Commission consistently took the position that there was no merit in the allegations that the Chairman had been involved or implicated in (i) the Wagalla Massacre; (ii) the Ouko murder; and (iii) irregular land allocations).

The above positions as taken by the Commission in the court case can be confirmed from the court judgment, which is freely available from the website of the National Council for Law Reporting (<http://www.kenyalaw.org>).

With the two court cases determined, there was no longer any or any legal impediment to the Chairman's resumption of office. Accordingly, the Chairman resumed and assumed his office in accordance with the original appointment. The rationale for the Chairman's course of action was twofold:

- (a) the Chairman has never resigned from or otherwise relinquished his office; and
- (b) the Chairman's original appointment has never been annulled, rescinded or otherwise lawfully vacated by the courts or any other authority. The appointment, therefore, remains valid and subsisting.

The Chairman is in receipt of a letter dated 6th January 2012 signed by two Commissioners, apparently signed on behalf of the Acting Chair. The letter seems to question the Chairman's resumption of office, allegedly because—

(a) *"no determination has been made on the issues presented before the Tribunal"; and*

(b) *the Chairman has returned to office "without consultation, and without authority."*

The letter also claims that the Chairman has demanded that documents related to the Final Report be released to him *"in direct contravention of existing policy established by the Commission,"* and that the Chairman has announced to the staff that he has returned *"to shape the Final Report."* Lastly, the letter purports to direct the Chairman to *"cease coming to the Commission's offices unless expressly invited to do so by the Commission,"* and to *"refrain from attempting to influence the Commission's work in any way."*

The Chairman wishes to clarify, and hereby directs, every Commissioner and staff member to note the following:

(a) there cannot be two centres of power, namely a Chair and an Acting Chair, in the leadership of the Commission. Under the TJRC Act, an acting Chair only performs the duties of the Chair during the absence or incapacity of the Chair. Accordingly, any powers or authority previously exercised by or on behalf of the Acting Chair lapsed by operation of law upon the Chairman's resumption of Authority;

(b) as conceded by the Tribunal's lawyers in Court, the term of the Tribunal formed to inquire into the Chairman's conduct expired in June 2011. Prior to that, the Tribunal had formally requested its appointing authority and other relevant government offices for the extension of its term. The appointing authority turned down the Tribunal's request for an extension of its term, presumably in view of the High Court's finding that the challenge lodged by the Chairman against the mandate of the Tribunal was valid. In view of the foregoing, there was no Tribunal in existence as at the date of the Chairman's resumption of office. Accordingly, the contention that the Chairman has returned to office in defiance of the Tribunal has no factual or legal merit;

(c) the Chairman does not need any *"consultation"* or *"authority"* of any Commissioner or staff member to resume office. Any Commissioner or staff member who is unhappy with the Chairman's return to office should raise the matter with the appointing authority or the courts. Anything short of this will be treated as insubordination, to be dealt with in accordance with the relevant legal and disciplinary procedures;

(d) the Commission and its staff are legally incapable of formulating any *"existing policy"* to withhold the Commission's documents from the Chairman. Any such *"policy,"* assuming one was put up in the absence of the Chairman, is *ultra vires* the TJRC Act and hence null and void. Accordingly, the Chairman expects every Commissioner and staff member to

avail to him all such of the Commission's documents as the Chairman may from time to time require in the execution of the functions of his office. Any Commissioner or staff member who defies any such request shall be deemed to be engaging in insubordination, to be dealt with in accordance with the relevant legal and disciplinary procedures;

- (e) the Chairman has not returned to office "*to shape the Final Report.*" Equally, the Chairman has not returned to office to "*influence the Commission's work.*" Instead, the Chairman has returned to lead the Commission and discharge his functions as set out in the TJRC Act, his oath of office and letter of appointment. Again, any Commissioner or staff member who is unhappy with the Chairman's return is free to raise the matter with the appointing authority or the courts;
- (f) the Commission and its staff are legally incapable of ordering or requesting the Chairman to "*cease coming to the Commission's offices.*" Any such request shall henceforth be deemed an act of disrespect and insubordination, to be dealt with in accordance with the relevant legal and disciplinary procedures; and
- (g) the Chairman does not need the Commission's or its staff's invitation, express or otherwise, to come to the Commission's offices. The Chairman comes to the Commission's offices by virtue of his having been validly appointed to his position, which appointment has since been confirmed by the courts.

All Commissioners and staff are hereby directed to note the above clarifications, and accord the Chair all the due cooperation in the discharge of his official duties. Again, any Commissioner or staff member who is unhappy with the directive is at liberty to raise the matter with the appointing authorities or the courts.

Yours faithfully,



BETHUEL KIPLAGAT

Chairman, Truth Justice and Reconciliation Commission

CC Chief Justice of the Republic of Kenya
 Secretary to the Cabinet & Head of the Civil Service
 Permanent Secretary, Ministry of Justice National Cohesion & Constitutional Affairs